92-1423

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BETTY A. LASITER, PETITIONER

V.

CARL GROW ET. AL., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the evidence of legal malpractice presented in the trial court was ignored by the Court of Appeals when it refused to review the issue.

2. Whether a reviewing court, during an appeal, can determine that certain affirmative defenses of legal malpractice were waived because of a failure to raise them as affirmative defenses in a pleading when the issues were not only in the pleading, but argued during the trial below, and therefore a part of the record.

3. Whether a state trial court can determine that a shareholder waived his ownership rights to the shares he owns, place them in the hands of another, but yet still require the same shareholder to pay damages for corporation affairs.

4. Whether a state trial court can determine a shareholder's ownership interest and simultaneously deny the same shareholder any ownership rights.

5. Whether the treatment by a shareholder of a liquidating distribution as capital gain for tax purposes terminates the shareholder status, which would prevent him from maintaining a shareholder's derivative action.

6. Whether a single shareholder, who is also the attorney for the corporation, can invest a mere $333, present a shareholder's derivative action, and reap benefits of a $1,000,000 individually rather than recover for the corporation.

PARTIES TO THE PROCEEDINGS

The parties in Linton, Ray et al -v- Greenwood Dev. Corp. & Grow, Carl W., Cause No. 49A02-9004-CV-00245, Lower Cause S780-0675 were appellants Betty A. Linton, a/k/a Betty A. Lasiter, and Ray Linton, Appellees Carl W. Grow and Greenwood Development Corporation.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
BASIS FOR JURISDICTION	3
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	10
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	31

TABLE OF AUTHORITIES

CASES

Kaiser Aluminum and Chemical Sales, Inc. v. Dickerhoff, 1964, 199 N.E. 2d 719, 136 Ind. App 238.

Ross v. Bernhard, 396 U.S. 531, 90 S. Ct.733, 24 L. Ed. 2d 719, 736

Smith v. Sperling, 354 U.S. 91, 99, 77 S. Ct. 1112, 1 L. Ed. 2d 1205, 1212-1213 (1957)

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. Amend. XIV

26 U.S.C., Section 331, 331(a)

26 U.S.C., Section 332(a)

U.S. Treas. Reg. 1.332-2(c)

STATE RULES

Ind. Rules of App. Proc., App. Rule 1

Ind. Rules of App. Proc., App. Rule 11(B)(a)(b)(c)(e)(f)

Ind. Rules of Trial Procedure Rule, 23.1

Betty A. Lasiter, Petitioner

v.

Carl Grow et.al., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. The opinion of the Marion County Superior Court, Room 7 is set forth in the appendix hereto; it was not reported.

2. No opinion was rendered by the Court of Appeals denying Petitioner's application for a stay during the appellate

application for a stay during the appellate process; its order, denying the stay is set forth in the appendix hereto; it was not reported.

3. The opinion of the Court of Appeals of Indiana is set forth in the appendix hereto; it was not reported.

4. No opinion was rendered by the Court of Appeals of Indiana on the petition for rehearing; its order denying rehearing is set forth in the appendix hereto; it was not reported.

5. No opinion was rendered by the Supreme Court of Indiana on the Petition to Transfer; its order denying transfer is set forth in the appendix hereto; it was not reported.

BASIS FOR JURISDICTION

The opinion of the Court of Appeals of Indiana (Pet. App.86) was entered on June 9, 1992, under cause number 49A02 9004 CV 245.

A timely petition for rehearing was denied on August 3, 1992 (Pet. App. 86).

A timely petition for transfer to the Supreme Court of Indiana for a hearing en banc was denied on October 26, 1992 (Pet. App. 86).

On January 15, 1993 Justice Stevens signed an order extending the time to file a petition for certiorari to and including February 23, 1993.

The jurisdiction of this Court rests upon 28 U.S.C.A. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The statute describing the complete liquidation of a corporation as full payment in exchange of stock is 26 U.S.C. Section 331 and 331(a), which reads in pertinent part as follows:

"SEC.331. GAIN OR LOSS TO SHAREHOLDERS IN CORPORATE LIQUIDATIONS.

Sec.331(a) DISTRIBUTIONS IN COMPLETE LIQUIDATION TREATED AS EXCHANGES.--Amounts received by a shareholder in a distribution in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock."

3. The statute describing the tax treatment of liquidation of corporate subsidiaries is 26 U.S.C., Section 332, which reads in pertinent part as follows:

"COMPLETE LIQUIDATIONS OF SUBSIDIARIES

Sec.332(a) GENERAL RULE.--No gain or loss shall be recognized on the receipt by a corporation of property distributed in complete liquidation of another corporation."

4. The Treasury Regulation describing the dissolution of corporate subsidiaries

is 1.332-2(c), which reads in pertinent part as follows:

"....A liquidation may be completed prior to the actual dissolution of the liquidating corporation. However, legal dissolution of the corporation is not required. Nor will the mere retention of a nominal amount of assets for the sole purpose of preserving the corporation's legal existence disqualify the transaction. (See 26 CFR (1939) 39.22(a)-20 (Regulations 118.)"

5. Appellate Rule 1, Indiana Rules of Appellate Procedure, reads in pertinent part as follows:

"These rules shall govern the practice and procedure in appeals to the Supreme Court and the Court of Appeals. ..."

6. Appellate Rule 11(B), Indiana Rules of Appellate Procedure, reads in pertinent part as follows:

"(a) that the opinion or memorandum decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent, or

(b) that the opinion or memorandum decision of the Court of Appeals erroneously decides a new question of law, concisely stating the same, or

(c) that there is a conflict between the opinion or memorandum decision and a prior opinion of the Court of Appeals stating concisely the conflict and opinion in which it occurs, or

(e) the oppinion or memorandum decision of the Court of appeals fails to

give a statement in writing of each substantial question arising on the record and argued by the parties. If this error is relied upon, the petition shall set forth such portions of the record so as to affirmatively disclose such failure, and establish that petitioner was prejudiced thereby.

(f) that the opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record, concisely setting out the misstatement (with reference to the record where appropriate), the materiality of the misstatement and specifically stating the resulting prejudice to the petitioner."

7. Appellate Rule 15(A), Indiana Rules of Appellate Procedure, reads in pertinent part as follows:

"(A) Publication and Precedential Value of Dispositions by Court of Appeals.

(1) The Court of Appeals may dispose of an appeal either by written opinion or by written memorandum decision.

(2) Disposition by written opinion shall be made if such disposition;

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Criticizes existing law, or

(c) Involves a legal or factual issue of unique interest or substantial public importance.

Provided, however, dissent from a memorandum decision may be expressed by written opinion. Such dissenting opinion may be designated "For Publication" if the dissenting judge determines that the standard for written opinion is satisfied.

Disposition of appeals shall otherwise be by memorandum decision.

(3) Unless specifically designated "For Publication", memorandum decisions shall not be published nor shall they be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case.

STATEMENT OF THE CASE

The state court of last resort of Indiana refused to hear the issue of legal malpractice, in violation of the opportunity to be heard provision of due process of law.

The Opinion of the Court of Appeals of Indiana presents an important question about Indiana Appellate Procedures by

refusing to follow the reviewing court's own rules, in violation of the opportunity to be heard provision of due process of law. Transfer denied.

The Court of Appeals of Indiana in this case deprived a shareholder of property by determining that a shareholder waived his ownership rights to stock for failure to participate in the business, in violation of the fourteenth amendment of the Constitution of the United States and its guaranty that a state shall not deprive a person of property without due process of law. The Court also determined that the same shareholder nevertheless remained liable for the debts of the corporation. Transfer denied.

The Court of Appeals of Indiana determined that a shareholder was not

required to maintain his status as a shareholder throughout the pendency of the litigation, in violation of Federal and State Rule 23.1. Transfer denied.

The Court of Appeals of Indiana permitted tax treatment fiction to be used for purposes of capital gain treatment, and thereby amended the Internal Revenue Code to provide for tax treatment fiction. Transfer denied.

REASONS FOR GRANTING THE WRIT

I

In the instant case, a shareholder derivative action was filed by Carl W. Grow and Greenwood Development Corporation (GDC). Betty Linton (a/k/a Lasiter), was named a defendant, Ray Linton (Betty's

former husband), moved to intervene, and received permission to do so. The Lintons claimed that Carl Grow could not represent the class of shareholders because of his conflict of interest in being a shareholder, president, and corporate attorney of GDC. Ray filed a counterclaim for improper actions by Grow, and Grow filed an answer. Also included was a claim of legal malpractice against Grow, asking for damages for Ray Linton. In the appeal, each point was discussed in the appellant's (Lintons) brief. The appellees (Grow and GDC), on page 6 of their brief, stated:

> Ray Linton filed his counterclaim on August 26, 1988.(R. 228). Count I of Linton's Counterclaim is based on Grow's alleged legal malpractice and sought $1,200,000 in damages. (R.229).

Linton alleged in Count II of his Counterclaim that Grow violated his fiduciary duty to GDC and again asked for $1,200,000 in damages. (R 229). Finally, Linton's Count III alleged Grow exerted "unauthorized control" over GDC and sought $1,200,000 in damages. (R.230). Grow filed his Reply, Affirmative Defenses and Counter-Counterclaim on October 17, 1988. (R.233)... .

The Indiana Court of Appeals determined:

> The Lintons' second argument is that Grow either waived or is estopped from pursuing the subject action because he had control over GDC and its assets during the time GDC pursued its claim against Union Federal and be-

cause Grow breached his duty of loyalty to GDC for his personal gain. Their third argument is that Grow is precluded from litigating this action by the doctrine of claim preclusion. These arguments fail because the Lintons' failed to put these defenses in issue in their responsive pleadings as required by Ind. Trial Rule 8(c).

Rule 8(c) states: Affirmative defenses. A responsive pleading (which by definition includes a complaint, or its equivalent the counterclaim) shall set forth affirmatively and carry the burden of proving ...any other matter constituting an avoidance, matter of abatement, or affirmative defense. ...if the pleading mistakenly designates a defense as a counterclaim or a counterclaim as a

defense, the court shall treat the pleading as if there had been a proper designation. Therefore, the facts show that the issues were properly before the trial court notwithstanding the fact that the Court of Appeals could not, nor did not read the record or its own rules.

Neither party had asked for such treatment of the issues in the brief they filed with the Court of Appeals, which acted sua sponte. In fact, the issues were fully tried before the trial court and briefed in the appeal.

It should be noted that Ray Linton's counterclaim was allowed to be filed quite sometime after the original lawsuit. The same claim filed by Betty Linton was stricken by the trial court as being untimely.

Both the Petition for Rehearing before the Indiana Court of Appeals, Second District, and the Petition to Transfer to the Indiana Supreme Court claim the failure to rule on this issue as a point in seeking reversal of the claim. Neither court addressed that claim, but merely denied the petitions without explanation. The applicable Indiana Rule of Procedure is outlined in Rules of Appellate Procedure 11.

The Lintons, in the Petition to Transfer, claimed the failure of the Court of Appeals to consider the issues, with the resulting claim that they were waived, resulted in a violation of Due Process under both the U.S. Constitution, through the 14th Amendment, as well as the Indiana Constitution.

It is always the duty of the trial courts and enforced by reviewing courts to insure that fundamental rights of due process are not improperly denied to litigants. Kaiser Aluminum and Chemical Sales, Inc., v. Dickerhoff, 1964, 199 N.E.2d 719, 136 Ind.App. 238. Due Process includes reasonable notice (completed here); opportunity for a fair hearing (completed here), and the right to have a court of competent jurisdiction determine if the findings of the trial court are supported by the evidence (not completed here).

The Indiana Court of Appeals first raised the issue of waiver of these defenses. It was not briefed, nor argued by the counsel for either side. This does not

comport to be due process, with an opportunity to be heard.

The rules of Appellate Procedure, specifically Rule 11, says the failure of the Appeals Court to give a statement in writing of each substantial question arising on the record and argued by the parties is one of the grounds for transfer, as well as misstating the record and making a sua sponte ruling.

In Indiana, the Courts of Appeal may dispose of their cases by Memorandum Decision, which is to have no precedential value, nor even be cited before any court except for the purposes of res judicata, collateral estoppel, or the law of the case (Rules of Appellate Procedure 15(A). They are not reported in any official reporter,

and generally are not distributed to the public.

The effect of such a procedure is to sweep a bad decision under the rug ... never to see the light of day. New interpretations are made daily, only no one knows of them since the courts themselves will not correct their own errors.

This court is being asked to require the Indiana Courts to follow their own rules of procedure as a matter of due process. Not only did the Linton's contest the "non-paid" purchase of the stock by Grow, but it is the same procedure that he complains of Ray Linton. However, he never issued himself a letter demanding payment before construction began.

Likewise, the Appeals Court treatment effectively struck down, without

consideration, the claims by the Lintons that Grow, an attorney who also represented the corporation, never completed his duty to issue the stock certificates; compromised on his own behalf and not that of the corporation a foreclosure filed against GDC through self-dealings; had a conflict of interest in representing the corporation when he also was a shareholder and president; breached fiduciry nelationship for his own personal gain and converted funds to his own use.

II

The corporation, GDC, was established by three married couples. The Lintons, Durans and Bullocks. Each couple owned a one-third interest, with the remaining one share of stock given to Grow for legal services rendered. There was never a

distribution of the shares, or even a breakdown of how much stock each individual person owned, except for a Sub-Chapter S Selection which gave each male 17 shares, and each female 16 shares. The Bullocks returned their shares to the corporate treasury, and Grow assumed ownership of them. He claimed to have purchased the stock, even if it was in violation of the corporate by-laws.

This case gives a new treatment for stockholders who do not take affirmative action to protect the stock by the Indiana Court of Appeals. The result is a waiver of stock ownership.

Here, Ray Linton's 17 shares of stock were admittedly taken by the Court, placed with that owned by the former wife, Betty Linton, and then the ownership rights were

given not to the corporation but to Grow, with GDC as the nominal defendant.

The trial court concluded, and the Court of Appeals noted, that Linton initially had 17 shares. However, the Judgment gave his 17 shares (along with 16 shares already held) to Betty Linton, the former wife now known as Betty Lasiter. There is no explanation of how the ownership interest was determined, nor how the ownership interest was deleted by the Court to make this distribution.

There was some attempt by the trial court to determine that Linton had "waived" his ownership interest by failing to respond to a letter about subscription payment or forfeiture. However, the law in Indiana is that such a forfeiture is not effective unless such procodures are a part

of the corporation by-laws. There is no such provision in these by-laws and the Court of Appeals was notified thereof by the Appellant Brief.

The trial court concluded that Ray Linton had violated his duties as an accountant for GDC, after he was hired by his former wife. (Findings, 76). Nowhere in the findings was Linton charged with taking an active part in actions detrimental to the corporation, other than for accounting practices.

The judgment of the trial court awarded:

ORDERED, ADJUDGED AND DECREED, that Plaintiffs Carl W. Grow, on behalf of the nominal Defendants Betty A. Lasiter f/k/a Betty A. Linton, and Ray Linton, jointly and severally, for the loss of equity

suffered by (GDC)...for a total of $827,852.53.

The trial court determined that Betty A. Linton was the owner of a third of the stock because of her previous claims she was equal partner with the other two stockholders, Duran and Grow.

III

There is no dispute that a corporation is a separate entity in and of itself. Shareholder derivative actions are filed on behalf of the corporation, and the shareholder must represent all persons so similarly situated to insure fair treatment. The shareholder must be a shareholder during the pendency of the lawsuit. Here, the Indiana Court of Appeals allowed Grow to expand a Federal Tax

Regulation to cover his "taxpayer" fiction for income tax purposes. The regulation involved, Treasury Regulation 1.332-2(c), is for complete liquidation of Corporate subsidiaries and has no affect in the instant case.

Grow treated his receipt of more than $13,000 as a capital gain, which would presuppose a sale of the stock, or other final disposition. If that is the case, the stock would have had to be retired, thereby removing any ownership interest he had. If he had no ownership interest he would not be able to represent the class of shareholders.

Grow, who never issued the stock certificates in the first place, said the "tax treatment fiction" did not remove him as a stockholder since there was no actual

exchange of his stock for anything. (Grow's Appellee Brief, P.21). Nowhere is there any evidence that Grow was representing a de jure or de facto corporation during the time of trial or on the date of judgment. The corporation had been dissolved by operation of law by the Indiana Secretary of State, and Grow had it reinstated, on trhe next business day following the day the one million dollar judgment was awarded, through an affidavit claiming all taxes were paid, when they had not been paid. (The evidence of this part of the trial was on the tape that was erased). (Pet. App. 99).

The reviewing court treated the liquidation as permissible because it misconstrued the Treasury Regulation. This particular treasury regulation applies to

the liquidation of Corporate Subsidiaries and has no application, in any manner, to the individual shareholders.

The IRS Code,. 26 U.S.C. 331, treats complete liquidation of a corporation as full payment in exchange of stock. The gravaman of this case is then to change the Federal income tax law as it applies to individual shareholders, and condones "tax treatment fiction".

IV

Grow brought this cause of action on behalf of the corporation, as a shareholder's derivative action. However, the court granted Grow, individually, judgment for the nominal defendant corporation.

The corporation is the real party in interest and the stockholder at best the nominal plaintiff. See Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 719, 736. The Court's ruling is different in Indiana.

This was a derivative lawsuit, not a class action status for Grow under Rule 23.1 of the Indiana Rules of Trial Procedure.

Justice Frankfurter discussed the difference in Smith v. Sperling, 354 U.S. 91, 99, 77 S.Ct.1112, 1 L. Ed.2d 1205, 1212-1213 (1957):

> The contrasting difference between a stockholder's suit for his corporation and a suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties. Whatever money or property

> is to be recovered would go to the corporation, not a fraction of it to the stockholder. When such suit is entertained, the stockholder is in effect allowed to conscript the corporation as a complainant on a claim that the corporation, in the exercise of what it asserts to be its uncoerced discretion is unwilling to initiate. Sweet v. Berminham, U.S.D.C., S.D.N.Y.(1975), 10 Fed Rules Service 2d, Cases, 454; p.456, 65 FAD 551.

In the trial court's Conclusions of Laws the judgment reads:

8. Grow as a derivative plaintiff, is entitled to recover on behalf of GDC, himself, and the other innocent shareholders similarly situated from the Defendants Lasiter and Ray Linton, for the losses suffered as a direct and proximate cause of their negligence in failing to maintain accurate and sufficient financial records of GDC to permit the preparation of

financial statements required by GDC's lenders.

Conclusion 9 and 10 also treat this as a class action type lawsuit.

The trial court was wrong, and the Court of Appeals refused to consider the error. It should be noted that the Court of Appeals did reverse a personal award of attorney fees to Grow from the defendants.

CONCLUSION

CONCLUSION: For all of the above reasons, the Petition for a Writ of Certiorari to the United States Supreme Court should be granted.

Respectfully submitted,

BETTY A. LASITER, Pro Se

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BETTY A. LASITER, PETITIONER

v.

CARL GROW ET.AL., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S APPENDIX

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TABLE OF CONTENTS

	PAGE
SPECIAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ENTRY OF JUDGMENT	1
OPINIONS	86
COURT OF APPEALS OF INDIANA, MEMORANDUM DECISION	88
AFFIDAVIT OF COURT REPORTER, JACQUELINE AUSTIN	99

STATE OF INDIANA IN THE SUPERIOR COURT OF

MARION COUNTY, ROOM NO. 7

CAUSE NO. S786-0675

CARL W. GROW, Plaintiff,

v.

GREENWOOD DEVELOPMENT CORPORATION, BETTY A. LINTON, RAY LINTON, Defendants.

AND

RAY LINTON,

Counterclaimant
and Counter-
Counterdefendant,

v.

THE GREENWOOD DEVELOPMENT CORPORATION and CARL W. GROW,

Counterdefendant
and Counter-
Counterclaimant.

DATE OF ENTRY: JANUARY 19, 1990

SPECIAL FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ENTRY OF JUDGMENT

This matter having come before this Court, sitting without a jury, for trial on the merits on January 23, 1989, and the trial having ultimately concluded on July 26, 1989, and the Court having heard all the evidence presented, and at the close of the evidence having requested the submission of the proposed findings of fact and conclusions of law thereon pursuant to Trial Rule 52 of the Indiana Rules of Trial Procedure, and having considered the evidence presented at trial and the submissions, briefs and arguments of the parties, and being otherwise duly advised in the premises, hereby makes its Special Findings of Fact, Conclusions of Law and enters its final Judgment herein as follows:

SPECIAL FINDINGS OF FACT

1. In May of 1977, Plaintiff, Carl W. Grow ("Grow"), was approached by Defendant, Betty A. Lasiter f/k/a Betty A. Linton ("Lasiter"), and asked to review a draft of the Articles of Incorporation for an Indiana corporation to be named Greenwood Development Corporation ("GDC").

2. As consideration and payment for Grow's review of the Articles of Incorporation for GDC, Grow was to receive one (1) share of stock in the newly-formed GDC.

3. The agreement to issue one (1) share of capital stock in GDC to Grow as consideration and payment for his services as an attorney was openly discussed at a pre-incorporation meeting of the subscribers for stock in GDC.

4. On June 17, 1977, the Articles of Incorporation for GDC were presented to, approved for filing, and filed with the Secretary of State for the State of Indiana. (Plaintiff's Exhibits "1" and "2").

5. The Articles of Incorporation for GDC listed six (6) initial directors of GDC as follows:

Eugene Duran

Marilyn Duran

Bill G. Bullock

Shirley L. Bullock

Betty A. Linton (Lasiter)

Ray Linton.

6. The Articles of Incorporation authorized the issuance of up to 1,000 common capital shares with equal rights and privileges and without par value.

7. The original shareholders and their respective ownership interests in capital stock of GDC, as shown on GDC's election of treatment as a Sub-Chapter S corporation for income tax purposes were as follows:

Eugene Duran	-	17 shares
Marilyn Duran	-	16 shares
Bill G. Bullock	-	17 shares
Shirley L. Bullock	-	16 shares
Ray Linton	-	17 shares
Betty A. Linton (Lasiter)	-	16 shares
Carl W. Grow	-	1 share

for a total of 100 shares issued and outstanding. (Defendants' Exhibit "A-33").

8. A Code of By-Laws was adopted by GDC during the summer of 1977 which provided that each shareholder was entitled to receive a stock certificate

which would have identified the name of the registered holder, the number of shares represented, whether the shares had been fully paid for or are liable to any further call or assessment. Despite this entitlement to the issuance of stock certificates, none were ever issued to any of the stockholders of GDC. (Plaintiff's Exhibit "6" and "53").

9. On November 22, 1977, pursuant to a written Agreement for Sale of Stock, Bill G. Bullock and Shirley L. Bullock transferred their thirty-three (33) shares of stock back to GDC for One Dollar ($1.00) and other unspecified valuable consideration. (Defendants' Exhibit "A-77").

10. Lasiter negotiated the purchase of the Bullock shares by GDC, and Grow was not aware what, if any, value had been

given by GDC for the return of the Bullock shares.

11. After the purchase of the Bullocks' thirty-three (33) shares by GDC, the respective holdings of GDC's shareholders were as follows:

Eugene Duran	-	17 shares
Marilyn Duran	-	16 shares
Ray Linton	-	17 shares
Betty A. Linton (Lasiter)	-	16 shares
Carl W. Grow	-	1 share
GDC Treasury	-	33 shares

12. Thereafter, Grow was again contacted by Lasiter with an offer of an increased ownership interest in GDC.

13. In late November of 1977, Lasiter and Eugene Duran decided to offer Grow an equal one-third (1/3) interest in GDC.

14. Although no specific value was placed upon Grow's one-third (1/3) interest, Eugene Duran believed that it had no appreciable value.

15. In order to acquire his one-third (1/3) interest, Grow would contribute his expertise in real estate transactions.

16. At the time of Lasiter's and Eugene Duran's offer of a one-third (1/3) interest in GDC to Grow, the potential conflict of interest that might arise if Grow acted as corporate attorney was openly discussed at a meeting at which all three of the parties were present.

17. It was resolved, though no formal minutes were kept, that although Grow could perform certain legal services for GDC, he would refrain from advising GDC as to corporate legal matters which

might affect his ownership interest. GDC did in fact hire disinterested attorneys to handle corporate legal matters. (Defendants' Exhibits "A-60", check stub number 1259, 1320, 1054, and "A-59", Plaintiff's Exhibits "16" and "157").

18. Thereafter, during 1978, Grow devoted a substantial amount of time and effort in the preparation of construction cost and profit projections and proposals for the acquisition and development of certain real estate projects for GDC.

19. These proposals, projections and other promotional materials were prepared by Grow and submitted to various potential lenders on behalf of and for the direct benefit of GDC.

20. During 1978, Ray Linton and Betty A. Linton (Lasiter) were in the process of a divorce.

21. In early August of 1978, Lasiter, who was then the Secretary and Treasurer of GDC, informed Grow that Ray Linton had never paid for his 17 shares of GDC capital stock, and asked Grow to send a letter to Ray Linton calling for immediate payment or Ray Linton's unpaid subscription would be terminated.

22. On August 5, 1978, Grow sent a letter to Ray Linton advising him that his subscription for 17 shares of GDC remained unpaid and requesting that he make payment of $170 pursuant to his verbal subscription agreement.

23. Grow's letter of August 5, 1978 to Ray Linton requested that Ray Linton advise GDC of his decision by August 11, 1978 or his subscription would be terminated. (Plaintiff's Exhibit "8").

24. Ray Linton received the August 5, 1978 letter from Grow but never responded to it in any fashion. (Linton's Reply to Counter-Claim).

25. On September 19, 1978 GDC filed its first annual report with the Indiana Secretary of State for the year ending June 30, 1978 which annual report listed Eugene Duran, Lasiter and Grow as the only officers and directors. (Plaintiff's Exhibit "4").

26. As listed in the annual report filed on September 19, 1978, Eugene Duran held the office of President; Lasiter held the office of Secretary/Treasurer; and Grow the office of Vice President.

27. On January 29, 1980 the only other annual report filed by GDC with the Indiana Secretary of State listed Eugene Duran as President; Lasiter as Secretary;

and Grow as Vice-President. Eugene Duran, Lasiter and Grow were also identified as the only directors of GDC, in this annual report (Plaintiff's Exhibit "5").

28. In July of 1978 Lasiter, a Certified Public Accountant ("CPA"), prepared a personal balance sheet for Eugene and Marilyn Duran which specified the fair market value of their interest in GDC as $15,000. (Plaintiff's Exhibit "46").

29. In August of 1978, Grow's financial statement (balance sheet) specified the fair market value of his interest in GDC as $15,000. (Plaintiff's Exhibit "9").

30. The July, 1978 personal balance sheet for Lasiter, signed by her, specified the fair market value of her interest in GDC as $15,000, an amount

equal to the fair market value of the respective interests of Eugene and Marilyn Duran, and Grow. (Plaintiff's Exhibit "153").

31. Eugene Duran considered himself, Lasiter and Grow as equal partners in GDC, and relied upon Lasiter as Secretary/Treasurer of GDC and his personal accountant to insure that the corporate records accurately reflected that status as equal partners.

32. As of September, 1978, Grow believed that he had acquired an equal ownership interest with Eugene and Marilyn Duran and Lasiter, and that Ray Linton's 17 shares had been forfeited.

33. Grow's one-third (1/3) ownership interest in GDC was not questioned by Lasiter at any time from September 1978 until December 1980.

34. An outline for a proposed real estate development project, to be known as Cielo Vista, which was submitted to prospective lenders by GDC, identified only Grow, Lasiter and Eugene Duran as the "principals" of GDC. (Defendants' Exhibit "A-94").

35. In November 1978, Eugene Duran, Lasiter and Grow accepted a loan commitment from Union Federal Savings and Loan Association signing as the "Shareholders" of GDC. (Plaintiff's Exhibit "12").

36. On December 1, 1978, Eugene Duran, Lasiter and Grow executed a Loan Agreement whereby GDC agreed to borrow $477,000.00 from Union Federal Savings and Loan Association ("Union Federal"). Union Federal agreed to lend additional sums up

to a total of $3,260,000.00 to GDC. (Plaintiff's Exhibit "12").

37. As part of the loan agreement between Union Federal and GDC, Eugene Duran, Grow and Lasiter, designated again as the shareholders of GDC, agreed to personally guarantee GDC's loans from Union Federal.

38. The federal income tax return for GDC for the year 1978 included three (3) K-1 Schedules for Eugene Duran, Lasiter and Grow, which stated that these three owners each held 33 shares of GDC stock. (Plaintiff's Exhibit "151").

39. Lasiter signed the federal income tax return for 1978 as Secretary for GDC which return states immediately above her signature as follows:
"Under the penalties for perjury, I declare that I have examined this return,

including the accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete."

40. Ray Linton's individual tax returns do not reflect any ownership interest in GDC after his divorce from Lasiter in 1978. (Plaintiff's Exhibit "150").

41. On March 17, 1982, Ray Linton appeared as a judgment defendant in a proceeding supplemental hearing in a Court in Johnson County, Indiana and when asked about his assets, specifically any stock ownership, failed to mention any ownership of stock in GDC. (Plaintiff's Exhibit "152").

42. From mid-1978 and until December, 1980, Ray Linton did not attend any meetings of the shareholders/directors

of GDC, nor was his absence ever mentioned by Lasiter or anyone else present at such meetings.

43. With funds borrowed from Union Federal, GDC undertook to purchase and develop three (3) parcels of real estate in Johnson County, Indiana referred to among the parties as Area 3, Area 8, and Area 13.

44. Area 3 consisted of approximately 8 acres located in the center of a planned unit development known as Valle Vista.

45. GDC proposed and had obtained the loan commitment from Union Federal for the funds necessary to build a 60-unit cluster home project to be known as Cielo Vista on Area 3.

46. Areas 8 and 13 were also purchased by GDC in December 1979 with

funds borrowed from Union Federal, and held for future development. (Plaintiff's Exhibit "148").

47. In December of 1978, construction of the Cielo Vista project began on Area 3.

48. GDC originally hired Credence Contractors to manage the construction of the Cielo Vista project.

49. Under the terms of GDC's agreements with Credence Contractors and Union Federal, Credence Contractors would submit monthly requests for payment of itself and various subcontractors and suppliers directly to Union Federal.

50. In the fall of 1979, a dispute arose between GDC and Credence Contractors which resulted in the termination of construction management by Credence Contractors.

51. Union Federal agreed to allow GDC to assume responsibility for construction management on the Cielo Vista project in late 1979.

52. Eugene Duran, Grow and Lasiter divided up the responsibilities associated with management of the construction process.

53. In late 1979, Lasiter assumed control of preparation of the monthly draw schedules that were submitted to Union Federal in order to obtain periodic disbursements of loan proceeds. (Plaintiff's Exhibit "16").

54. In late 1979, Grow assumed responsibility for marketing the Cielo Vista project and preparing proposals for future development of Area 8 and 13.

55. In Late 1979, Eugene Duran actively participated in promotion of the development of Areas 8 and 13.

56. Lasiter, in late 1979 and throughout 1980, maintained control over the books and records of GDC and was responsible for payment of GDC's employees, employee withholding taxes, engineering expenses, insurance premiums, advertising expenses, and loan payments.

57. In late 1979, Lasiter informed Grow and Eugene Duran that GDC had sufficient cash flow to pay salaries to the officers/directors.

58. It was agreed that Eugene Duran and Grow would each receive a monthly salary from GDC of $750.00.

59. It was agreed that Lasiter would receive a monthly salary from GDC of $1,500.00.

60. It was agreed that Lasiter would be allowed to re-locate her accounting practice, known as Linton & Company, into one of the unsold model units, and that no rent would be charged by GDC.

61. It was agreed that Eugene Duran would enjoy the use of a truck leased at GDC's expense.

62. It was agreed that Grow would enjoy the use of an automobile financed at GDC's expense.

63. In late 1979, Jack Woerner was hired by GDC as construction supervisor at a monthly net salary of approximately $1,100.00. (Defendants' Exhibit "A-60", check stubs 1122, 1130, 1154, 1158, 1179, and 1224).

64. In April of 1980, Lasiter informed Grow and Eugene Duran that GDC could not afford to continue paying any

salaries to the officers/directors and that the monthly salaries to Grow, Eugene Duran and Lasiter would cease.

65. After April of 1980, neither Eugene Duran nor Grow was paid a salary by GDC.

66. In early 1980, Lasiter hired her brother, Irvin Fisher, to replace Jack Woerner as construction supervisor.

67. During 1980, Lasiter hired her ex-husband, Ray Linton, to assist her in maintaining the books and financial records of GDC and preparing the tax returns for GDC.

68. From April 1980 on, Lasiter and Ray Linton maintained exclusive control over the books and records of GDC.

69. In July and August 1980, Grow and Eugene Duran became aware that certain of GDC's creditors, who were supposed to

have been paid directly by Lasiter with GDC funds, and not by Union Federal, were claiming they had not been paid.

70. When Grow questioned Lasiter about the claims of these creditors, she told him that their claims were either disputed or had already been paid.

71. Pursuant to its loan agreement with GDC, Union Federal was not required to advance additional construction monies until a specified number of units had been sold.

72. In the late summer of 1980, GDC authorized loans of $10,000.00 each to Grow and Lasiter to be used as downpayments on unsold Cielo Vista units to meet the requirements of GDC' loan agreement with Union Federal. (Defendant's Exhibit "A-45").

73. By the fall of 1980, creditors of GDC who were to have been paid by Lasiter with GDC funds began filing suit against GDC for non-payment.

74. In November of 1980, Grow asked Lasiter if he could inspect the books and records of GDC with respect to the claims raised by creditors who were filing suit. Lasiter did not permit Grow to inspect the books and records of GDC at this time.

75. In the fall of 1980, it came to the attention of Grow that insurance premiums were overdue. (Plaintiff's Exhibits "23" and "6", paragraph 4.066).

76. On November 7, 1980, Eugene Duran and Marilyn Duran signed a written proxy giving Grow authority to attend any and all meetings of GDC stockholders and vote their shares at any such meeting.

77. Grow repeated his informal demand to Lasiter for inspection of the books and records of GDC in mid-November of 1980, and Lasiter failed to permit such an inspection.

78. On November 24, 1980, Grow, as President of GDC, sent notice to the shareholders of GDC of a meeting to be held at the sales office of Cielo Vista at 11:00 o'clock a.m. on December 6, 1980. (Plaintiff's Exhibit "24").

79. Grow's notice of the shareholder's meeting scheduled for December 6, 1980 included a request to Lasiter as Secretary/Treasurer and shareholder of GDC to render the financial statements and tax returns for the fiscal years ended May 31, 1979 and May 31, 1980, for review by the shareholders.

80. On the morning of December 6, 1980, Grow arrived at the sales office Cielo Vista shortly before 11:00 o'clock a.m. only to find that the door to the sales office was locked, and he did not have a key.

81. Handwritten minutes of the December 6, 1980 meeting, which show Grow in attendance in person and Eugene and Marilyn Duran in attendance by their proxy, reflect that Lasiter failed to appear or present the financial statements of GDC for inspection by the shareholders. (Plaintiff's Exhibit "25").

82. On December 10, 1980, a meeting was held at Union Federal at which Union Federal noted its own demand for GDC's financial statements but that such statements had never been supplied. The fact that failure to provide the financial

statements constituted a default under GDC's loan agreements was also noted at this meeting. (Defendants' Exhibit "A-37").

83. Also noted at the meeting of December 10, 1980, was the representation that Ray Linton would not turn over the records of GDC until he had been paid. (Defendant's Exhibit "A-37").

84. On December 10, 1980, Grow made a formal written demand upon Lasiter for delivery of the following books and records of GDC through his attorney, Stephen Plopper, to be delivered not later than December 15, 1980:

1. Greenwood Development Corp. Corporate Record Book, By-Laws and Minutes.

2. The corporation's Financial Statements of May 31, 1979 and May 31, 1980.

3. Corporate Tax Returns for fiscal years ended May 31, 1978, 1979, and 1980.

4. The corporate General Ledger.

5. The corporate check book and all cancelled checks from the date of inception of the corporation.

6. Closing statements for all sales of units at Cielo Vista.

7. Copies of all current contracts for sales of units of Cielo Vista.

8. A copy of the Lease Agreement for the "Cannon" rental unit.

9. Copy of the Trisler Lease Agreement, and a copy of the Put and Call Option for Trisler unit.

10. AIA forms for Buildings B, F, and K.

(Plaintiff's Exhibit "26")

85. In Grow's demand for the books and records of GDC of December 10, 1980, Lasiter was advised that her failure to deliver the books and records would leave Grow no alternative but to immediately demand their return through Court action. (Plaintiff's Exhibit "26").

86. Lasiter refused to honor the legitimate formal demand, made upon her in writing on December 10, 1980, by Grow, as

President, a fellow director and shareholder of GDC.

87. Grow, Lasiter and Eugene Duran were summoned to a special meeting of the Board of Directors of GDC at the offices of Union Federal on December 18, 1980.

88. Grow, Lasiter and Eugene Duran were identified in the body of a Call and Waiver of Notice of Special Meeting of GDC as "all of the Directors of Greenwood Development Corporation" as originally prepared, although a signature line on the Call and Waiver of Notice for "Ray Linton, Director" was added either at or after the meeting of December 18, 1980. (Plaintiff's Exhibit "28").

89. The purpose of the December 18, 1980 special meeting, as set forth in the Call and Waiver of Notice, was to have each director sign and Agreement for

Termination of Obligation to Pay Mortgage Indebtedness and Guaranties; to convey areas 8 and 13 to Union Federal; and to cause the release of liability of GDC on the loans for Areas 8 and 13 to Union Federal. (Plaintiff's Exhibit "28").

90. On December 18, 1980, Lasiter and Grow signed an Agreement for Termination of Obligation to Pay Mortgage Indebtedness and Guaranties, whereby GDC admitted that it was in default under the terms and conditions of two mortgage loans on Areas 8 and 13, and agreed to convey Areas 8 and 13 back to Union Federal in lieu of foreclosure and in exchange for releases of liability of GDC for any deficiency and themselves on their personal guaranties. (Plaintiff's Exhibit "148").

91. The fair market value of Area 8 consisting of approximately 4 acres, was appraised at $216,550.00 as of January 15, 1980. (Plaintiff's Exhibit "146").

92. The fair market value of Area 13, consisting of approximately 7.5 acres was appraised at $263,500.00 as of September 23, 1980. (Plaintiff's Exhibit "147").

93. After deduction of a reasonable sales commission of seven percent (7%), and deduction of the principal and interest due Union Federal on its loan, GDC lost equity of $60,083.87 on the deed-back of Area 8 to Union Federal. (Plaintiff's Exhibits "146" and "148").

94. After deduction of a reasonable sales commission of seven percent (7%), and deduction of the principal and interest due Union Federal on its loan,

GDC lost equity of $88,961.66 on the deed-back of Area 13 to Union Federal. (Plaintiff's Exhibits "147" and "148").

95. Based upon projections prepared by Grow in July of 1979, GDC would have received gross sales receipts for the GDC units at Cielo Vista of $4,624,606.00, which after deduction of projected construction costs and loan repayments of $3,737,408.00, and anticipated sales commissions of $208,931.00, would have resulted in net profits to GDC and its shareholders of $678,807.00 on the Cielo Vista project. (Plaintiff's Exhibit "15, pp. 1, 4, and 5").

96. On December 16, 1980, Grow received a proposal from Melody Homes, Inc., whereby Melody Homes would complete construction of the uncompleted units in Cielo Vista at a cost of $42,950.00 per

unit, which units could then have been sold at a substantial profit to GDC. (Plaintiff's Exhibit "27").

97. The Melody Homes proposal was rejected by Lasiter in December of 1980.

98. On December 31, 1980, Lasiter approved a letter from her attorney, Charles E. Wilson, to Union Federal regarding the Cielo Vista loan. (Plaintiff's Exhibit "162").

99. In her letter of December 31, 1980 to Union Federal, Lasiter stated inter alia as follows:

"[I]t is Betty Linton's [Lasiter's] reluctant decision to, and she does hereby, disavow any responsibility for loans to Greenwood Development Corporation heretofore made by your association and that she considers that any guarantees or

other instruments of indebtedness are of no further force or effect.

* * *

It is the hope of Betty Linton [Lasiter] that your association will immediately commence a foreclosure action and that in connection with that foreclosure seek the appointment of receiver for the properties. You may anticipate the cooperation of Betty Linton [Lasiter] in any manner reasonably subject to her control, and you may also anticipate her concurrence for your request for such a receiver.

Betty Linton [Lasiter] most assuredly regrets that this action is necessary, but cannot see any other way that the present standoff can be resolved."

(Plaintiff's Exhibit "162").

100. On January 20, 1981, Grow filed his Complaint in the instant case as a derivative action on behalf of GDC and himself and other shareholders similarly situated. (Plaintiff's Complaint).

101. In February of 1981, Grow and his attorney, and Eugene Duran were permitted to inspect, but not copy, certain of the cancelled checks of GDC and certain bank statements in the offices of Ice, Miller, Donadio and Ryan, then counsel for Lasiter. No general ledger of GDC was made available to them as none was ever maintained by Lasiter or Ray Linton.

102. In February of 1981, Grow first became aware that Lasiter had continued to pay herself a salary of $1,500.00 per month after she had informed the other directors and officers, Grow and Eugene

Duran, in April of 1980, that GDC could no longer afford to do so.

103. In February of 1981, Grow became aware for the first time that, in addition to her salary, Lasiter had paid much of the operating costs of her public accounting practice with GDC funds.

104. It was in February of 1981, that Grow first became aware of payments made by Lasiter to her brother, Irvin Fisher, that were far in excess of what GDC had paid Jack Woerner, Irvin Fisher's predecessor, as construction supervisor.

105. In January, 1981, it came to the attention of Grow that Lasiter had failed to make payments on the 1976 automobile which GDC had provided for his use. On January 18, 1981, by Corporate Resolution, GDC's Board of Director's approved the sale of the automobile to Grow, in

exchange for his assumption of the liabilities against it and his agreement to hold GDC harmless for any further liability. (Plaintiff's Exhibit "29").

106. On January 29, 1981, Hubert Grow, GDC's insurance agent and the father of Carl Grow, wrote a letter to Union Federal advising that certain of GDC's builders risk insurance premiums were not paid in September, October, November, December and January and requested payment therefore. This letter of January 29, 1981, made reference to the fact that a summary of unpaid premiums had been provided to Union Federal on December 18, 1980, at Union Federal's request. (Plaintiff's Exhibit "30").

107. On February 3, 1981, an invoice for the annual premium of GDC's master policy in the sum of $4,001.00 was sent to

GDC. Thereafter, this master policy was cancelled for non-payment of premium and Union Federal undertook to provide insurance coverage under the terms of the loan agreements with GDC. (Plaintiff's Exhibits "31, 32 and 33").

108. On March 17, 1981, Lasiter provided Union Federal with copies of GDC's Articles of Incorporation, By-Laws and minutes of meetings of GDC's Board of Directors at Union Federal's request. In her letter to Union Federal of March 17, 1981, Lasiter advised that GDC's initial bank statement had been given to Charles E. Wilson and that the following records of GDC records never existed:

- Stock subscriptions;
- Stock certificates;
- Stock subscription meeting minutes;

- Minutes of first shareholders meetings.

(Plaintiff's Exhibit "53").

109. On February 5, 1981, National Bank of Greenwood advised Grow, Eugene Duran and Lasiter that their note in the principal amount of $23,628.22, plus 18% interest since May 29, 1980, was past due since December 1, 1980, and demanded payment in full by February 17, 1981. (Plaintiff's Exhibit "34").

110. Thereafter, Union Federal filed an action to foreclose GDC's mortgage on Area 3, the Cielo Vista project, in Johnson County Circuit Court, denominated as Cause No. 31,808, which included claims against Grow, Lasiter and Eugene Duran on their personal guaranties.

111. On July 22, 1981, at the request of the attorneys for GDC, a Subpoena Duces

Tecum was issued to Ice, Miller, Donadio & Ryan, commanding them to produce the books and records of Greenwood Development Corporation in Johnson County Circuit Court on July 23, 1981. (Defendant's Exhibit "A-51, p. 2-3").

112. On July 23, 1981, Lasiter's son, Mark L. Lasiter, executed a receipt whereby he acknowledged the receipt from Charles E. Wilson, of Ice, Miller, Donadio & Ryan, of all the books and records which had been delivered to Charles E. Wilson by Lasiter or her son on or about January 19, 1981, in connection with GDC. (Defendant's Exhibit "A-51").

113. On July 23, 1981, a hearing was held in Johnson County Circuit Court in the foreclosure action, on Union Federal's Petition for the Appointment of a Receiver. (Defendant's Exhibit "W").

114. On July 29, 1981, the Honorable Larry McKinney, Judge of Johnson County Circuit, entered an order which stated in pertinent part:

"Upon argument of Counsel and Stipulation of the parties, it was agreed and the Court so orders that for the present time, a receiver will not be appointed, but in lieu thereof, the following procedure, with respect to rents from the properties now occupied, shall be followed until further notice of the Court:....."

(Defendant's Exhibit "W").

115. Judge McKinney's Order of July 23, 1981, set forth the procedure whereby Grow was to receive the rental payments from three (3) residential units at Cielo Vista, and the sum of $450.00 per month from Lasiter for the occupancy of the model unit by her accounting firm, and

deposit these sums in a savings account with Arsenal Federal Savings and Loan Association. (Defendants' Exhibit "W").

116. Thereafter, Grow obtained copies of cancelled checks from Union Federal Bank and Trust Company which had been drawn on GDC's account by Lasiter. (Plaintiff's Exhibits "54 to 128").

117. Grow also obtained copies of the monthly bank statements for GDC's account at Union Bank and Trust Company from December 31, 1979 to February 28, 1981. (Plaintiff's Exhibits "129 to 142").

118. The copies of checks obtained by Grow directly from Union Bank and Trust Company revealed that Lasiter continued to pay herself a $1,500.00 monthly salary from GDC funds after April, 1980, and after she had told Grow and Eugene Duran

that GDC could not afford to pay salaries of officers and directors.

119. In the fall of 1980, the Board of Directors of GDC had passed a resolution that Betty Linton and Carl Grow could each receive $10,000.00 to use as downpayments on units at the Cielo Vista project. (Defendants' Exhibit "A45".) The sales of these units would satisfy the lenders' sales requirements so further construction loans could be disbursed.

120. In August, 1980, individuals by the name of Koontz had made a downpayment of $8,000 on a unit at 509 Cielo Vista.

121. Lasiter, after paying commissions to her son, Mark Lasiter, and Marian Halik, retained the balance of $5,825.00 for herself. (Defendants' Exhibit "A60", check stub numbers 1447, 1449 and 1451.)

122. At the closing on the unit at 509 Cielo Vista, there were proceeds in excess of the funds needed and Lasiter paid herself another $9,000.00.

123. After April, 1980, without the consent, authorization or knowledge of Eugene Duran and Grow, Lasiter paid herself, her accounting firm's expenses, and bonuses to her brother Irvin Fisher, sums totalling $29,649.53. (Defendants' Exhibit "A-60", check stub numbers, 1201, 1202, 1228, 1231, 1268, 1269, 1285, 1287, 1294, 1309, 1314, 1333, 1356, 1378, 1417, 1418, 1431, 1434, 1443, 1485, 1487, 1525, 1526, 1529).

124. On November 20, 1980, Betty Linton wrote her brother, Irvin Fisher, a check for $8,000.00, leaving less than $2,000.00 in the corporate account.

(Defendants' Exhibit "A60", check stub 1567.)

125. Lasiter failed to pay employee withholding taxes for the last three (3) quarters of 1980, which ultimately resulted in a levy by the Internal Revenue Service and assessment of a penalty in the sum of $2,571.82 in August of 1983. (Plaintiff's Exhibit "42").

126. On Wednesday, July 6, 1983, the Shareholders of GDC held a meeting. Those present were: Grow, Eugene Duran, Lasiter, Frank Spencer, attorney for Linton, Larry Pleasants, attorney for Eugene Duran, and Stephen Plopper, attorney for Grow. (Plaintiff's Exhibit 38.)

127. At the July 6, 1983 Shareholders meeting, the settlement agreement between the Corporation and Union Federal was

discussed. The Corporation passed a resolution to approve said settlement agreement by a vote of 2 for, 1 against. (Plaintiff's Exhibit 38.)

128. At the July 6, 1983 Shareholders meeting, the execution of a Judgment between the Corporation and Union Federal for submission to the Johnson County Circuit Court was also discussed. A resolution to approve execution of said judgment was passed by a vote of 2 for, 1 against. (Plaintiff's Exhibit 38.)

129. A Judgment and Decree was entered on Union Federal's foreclosure suit regarding the Defendants Grow and Eugene Duran on July 7, 1983 which inter alia released grow and Duran from liability on their personal guaranties. (Defendants' Exhibit "O".)

130. The final paragraph of the Judgment and Decree of the Johnson Circuit Court in Union Federal's foreclosure action provided as follows:

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Escrow Account established pursuant to Order of this Court was Arsenal Savings and Loan Association be released and paid to Defendant, Carl W. Grow, Custodian of such Escrow Account free from claim of all parties to this action and Defendant, Carl W. Grow, Custodian of such Escrow Account is hereby Ordered to divide and pay over the funds from such account to the Defendants, Greenwood Development Corp., Eugene Duran, Betty L. (sic) Linton and Carl W. Grow as they may agree. (Defendants' Exhibit "O").

131. On August 30, 1983, Lasiter moved the Johnson County Circuit Court to amend the above-referenced Judgment and Decree to include her own release from liability on her personal guaranties of GDC debt. (Defendants' Exhibit "Y".)

132. The fact that Stephen Plopper signified approval of Lasiter's Motion to Amend by GDC as "Former Counsel to Greenwood Development Corporation on behalf of Carl W. Grow, President, Greenwood Development Corporation", or that Frank Spencer, then counsel for Lasiter, was unaware the Plopper signed as such, has no effect on the validity of the Judgment and Decree as amended because the pleading so signed is Lasiter's own Motion and she is estopped to contest its propriety or validity as she has long since received the benefit of the

amendment she sought. (Defendants' Exhibit "Y").

133. The Johnson County Circuit Court issued an Order Amending the Agreed Judgment to include Lasiter on August 30, 1983. (Defendants' Exhibit "X".)

134. In 1983, GDC's sole remaining asset was the escrow account at Arsenal Savings and Loan, established by the Johnson County Circuit Court on July 29, 1981. (Plaintiffs' Exhibit 38; Defendants' Exhibit "W").

135. At the July 6, 1983 Shareholders meeting, distribution of monies from said escrow account was discussed. Linton objected to any distribution on the grounds that she had failed to pay employee withholding taxes and that the funds available in the escrow account

should be used to pay the outstanding taxes. (Plaintiff's Exhibit 38.)

136. The motion to distribute monies from the Corporate escrow account was carried by a vote of 2 for, 1 against at the July 6, 1983 Shareholders meeting. (Plaintiff's Exhibit 38.)

137. At the July 6, 1983 Shareholders meeting, a motion was made that further discussion of the division of the escrow account be tabled until July 14, 1983, at 10:00 a.m. The motion carried, 2 for, 1 against. (Plaintiff's Exhibit 38.)

138. A meeting of the shareholders of GDC was held on July 14, 1983. Those in attendance were as follows: Grow, Eugene Duran, Larry Pleasants, attorney for Eugene Duran, and Stephen Plopper, attorney for Grow. (Plaintiff's Exhibit 39.)

139. At the July 14, 1983 meeting, the shareholders passed a resolution that the Corporation's escrow funds were to be distributed as follows: payment of Stephen Plopper and Jim Sargent for legal services for Greenwood Development Corporation, $10,000.00, payment to Eugene Duran for demolition of Building "B" of Cielo Vista, $500.00; payment of accrued expenses for units until settlement, $100.00; payment of corporate attorney expenses if necessary, $100.00; and any remaining funds to be divided three ways and disbursed to Duran, Grow and Lasiter. (Plaintiff's Exhibit 39.)

140. Checks to pay the aforementioned expenses as well as the distribution to Grow, Duran and Lasiter of the remaining funds in the amount of $2,647.00 each were

drawn by Grow on August 3, 1983. (Plaintiff's Exhibit 44.)

141. The aforementioned checks were returned unpaid as Lasiter had directed the Internal Revenue Service ("IRS") to the escrow account, and the IRS had levied on the escrow account on August 5, 1983 for the unpaid employee withholding taxes of the corporation and penalties totaling $7,265.17. As a result of the IRS levy, Arsenal Federal Savings & Loan temporarily froze the account. (Plaintiff's Exhibit 42 and Defendants' Exhibit "A92".)

142. After the IRS levy on GDC's escrow account, a balance of $11,374.26 remained in said account. (Plaintiff's Exhibit 43.)

143. On August 25, 1983, the GDC funds which remained in the escrow account of GDC were paid over to Grow in

accordance with the Judgment and Decree of the Johnson Circuit Court (Defendants' Exhibits "A160", "A161" and "O").

145. The funds from the escrow account were deposited into account number 73 64367 at American Fletcher National Bank, now know as Bank One. (Testimony of Grow and Plaintiff's Exhibit "145").

145. During the course of his involvement with GDC, Grow paid obligations of the corporation out of his personal bank accounts. Sums paid by Grow on behalf of the corporation totalled $12,650.00 (Plaintiff's Exhibit "145").

146. The $11,374.26 deposited by Grow into account number 73 64367 have been used to pay outstanding debts and obligations of the Corporation and GDC has suffered no injury as a result of Grow's

handling of these funds. (Plaintiff's Exhibit "145").

147. The Defendants, Betty Lasiter and Ray Linton, called a meeting of the Board of Directors of Greenwood Development Corporation on Monday, January 16, 1989, just one week prior to the trial of this matter, and encouraged Bill Bullock and Shirley Bullock to attend as Directors

148. Neither Bill Bullock or Shirley Bullock had received notice of or participated in a Board of Directors' meeting since November, 1977. (Testimony of Bill Bullock.)

149. At the beginning of the meeting, Shirley Bullock made known her desire to resign from the Board of Directors to the other individuals present. In violation of paragraph 5.13 of the Code of By-Laws

of Greenwood Development Corporation (Plaintiff's Exhibit "6"), said resignation was not accepted by the persons at the meeting until several proported resolutions were passed. (Plaintiff's Exhibit "158").

150. Pursuant to the Minutes of January 16, 1989, meeting, Shirley Bullock's resignation was not accepted until the discussion of "new business". The Court finds that the sole purpose of such delay in accepting said resignation was to give the appearance of a quorum of alleged directors so that Lasiter and Ray Linton could attempt the election of new officers and directors; the hiring of corporate counsel for GDC; the waiver of GDC's attorney-client privilege; a call for "unpaid" stock subscriptions; and

other "Corporate" resolutions could be passed. Plaintiff's Exhibit "158").

151. Eugene Duran, Lasiter and Grow each intended that they be treated as equal "partners" in their dealings with each other, which intentions were manifest in their representations to lenders, other third-parties and each other.

152. Inasmuch as it was the manifest intention of Eugene Duran, Lasiter and Grow to treat each other and be treated by each other as equal "partners" in the ownership, control and operation of a closely held corporation, GDC was truly and "incorporated partnership".

153. As equal shareholders in the "incorporated partnership" that was GDC, Eugene Duran, Grow and Lasiter owed to each other fiduciary duty to deal fairly, honestly and openly with their fellow

stockholders and make disclosure of all essential information.

154. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she led them to believe GDC could not afford to pay any of them salaries after April 1980, and then continued to pay herself a salary of $1,500.00 per month through November of 1980, without their consent, authorization, or knowledge.

155. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she paid a substantial portion of the expenses of her accounting business with GDC funds, without disclosing these payments to them.

156. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she

hired her brother, Irvin Fisher, to replace Jack Woerner as construction supervisor on the Cielo Vista project, and proceeded to increase his salary and pay him bonuses without the knowledge, authorization or consent of Eugene Duran and Grow, during the same period their salaries had been halted altogether.

157. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she failed to pay employee withholding taxes in full for the last three (3) quarters of 1980, without disclosure of this essential fact to them.

158. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she failed to disclose to them that she had neglected to pay for essential engineering

services, advertising and marketing expenses and then misled them into believing these bills were disputed or had been in fact paid.

159. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she failed to inform them that she had neglected to make the loan payments on Areas 8 and 13 which ultimately caused GDC to lose the substantial equity in these parcels.

160. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she neglected to pay insurance premiums that were essential to the continued development of the Cielo Vista project, and failed to disclose this fact to them.

161. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she caused to be paid over to herself the balance of the downpayment on the sale of a unit to Koontz after payment of sales commission to her son and then retained the surplus loan proceeds from the closing as a "bonus" without disclosing to Eugene Duran or Grow that she had done so.

162. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she neglected to keep complete and sufficient financial records for GDC that would have permitted the preparation of proper financial statements which GDC was required to submit as a part of its obligation under its loan agreements with Union Federal.

163. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she refused to permit the inspection of GDC financial records despite specific, legitimate requests by Grow in his capacity as President, director and shareholder of GDC.

164. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she refused to provide the financial statements to Union Federal that were a prerequisite to Union Federal's continued funding of construction of the Cielo Vista project.

165. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she encouraged Union Federal's foreclosure of

its mortgage on the Cielo Vista project and the appointment of a receiver over it, provided that she retain some degree of control and escape liability on her guaranty, without due regard to the interests of Eugene Duran or Grow and their obligations as guarantors on the same loan.

166. Lasiter breached her fiduciary duty to deal openly, honestly and fairly with GDC, Eugene Duran and Grow when she paid her brother, Irvin Fisher $8,000.00 in November of 1980 from GDC funds thereby reducing the balance of funds on hand to approximately $2,000.00.

167. Lasiter's conduct in failing to maintain a general ledger and such other financial records for GDC as would permit the preparation of accurate financial statements and tax returns for GDC

violated the standards of ethical conduct and degree of professional care and her professional duty to her client as required in the practice of public accounting in central Indiana. (Testimony of Stanley E. Isaac).

168. Lasiter's refusal to turn over the books and records of GDC as maintained by her, in the face of a legitimate request made upon her by an officer, director and shareholder of GDC violated the standards of ethical conduct and degree of professional care required in the practice of public accounting in central Indiana. (Testimony of Stanley Isaac).

169. Ray Linton's assistance in the maintenance of the books and records of GDC for a fee, without insisting that sufficient records be maintained so as to

permit the preparation of accurate financial statements and tax returns, or permitting the delivery of such original records as were within his control to GDC upon legitimate request therefore, violated the standards of ethical conduct, the degree of professional care and his professional duty to his client as required in the practice of public accounting in central Indiana. (Testimony of Stanley Isaac).

170. Grow is the lawful owner of thirty-three (33) shares of GDC stock.

171. Grow is currently the President, Lasiter is currently a Vice-President, Eugene Duran is a Vice-President of GDC, and Marilyn Duran is currently Secretary. There are no other officers of GDC.

172. The Board of Directors of GDC consists of Grow,

Lasiter and Eugene Duran. There are no other directors of GDC.

173. The shareholders of GDC and the respective holdings of each are as follows:

Carl W. Grow	-	33 shares
Eugene Duran and Marilyn Duran, jointly	-	33 shares
Betty A. Lasiter f/k/a Betty A. Linton	-	33 shares

There are no other shareholders of GDC.

174. The actions of Lasiter in breach of her duties to deal openly, honestly and fairly with GDC, Eugene Duran and Grow caused GDC the loss of the funds she misappropriated to her own use, by way of unauthorized disbursements for her own salary, the salary and bonuses of her brother, Irvin Fisher, the expenses of her accounting practice, and the penalties

imposed by the IRS for her failure to pay employee withholding taxes.

175. The actions of Lasiter in breach of her duties to deal openly, honestly and fairly with GDC, Eugene Duran and Grow in failing to pay crucial expenses of GDC for engineering ad marketing services, insurance premiums, employee withholding taxes, loan payments while misappropriating GDC funds to her own use and benefit caused GDC to suffer the loss of equity in Areas 8 and 13, and the loss of profit in the Cielo Vista project.

176. The actions of Lasiter and Ray Linton in breach of their duties as accountants for GDC, in failing to maintain such records as would permit the preparation of the financial statements required and requested by GDC's lenders and shareholders caused GDC to suffer the

loss of equity in Areas 8 and 13, and the loss of profit in the Cielo Vista project.

177. The evidence presented in this cause is insufficient to support a finding that GDC suffered any damages as a result of any action by Grow in performing legal services for GDC.

178. The evidence submitted regarding Grow's acquisition of a one-third (1/3) interest in GDC does not support a finding that Grow obtained any advantage or benefit that was not conferred upon him by the informed consent of Lasiter and Eugene Duran in accordance with the manifest intentions of these parties.

179. Grow, as derivative plaintiff herein, has incurred attorney's fees in the prosecution of this case on behalf of GDC in the sum of $60,114.92 as of the close of trial in this matter which the

court finds to be reasonably incurred. (Plaintiff's Exhibits "163, 164, 165 and 166").

180. In addition to attorney's fees, Grow incurred the cost of deposition transcripts in this case in the sum of $1,675.75, in the prosecution of this case on behalf of GDC.

181. Grow incurred the expense of hiring an expert witness, Mr. Stanley E. Isaac, in the sum of $840.00 to testify in this case as to the standards of conduct and degree of care required of a Certified Public Accountant in central Indiana, in furtherance of the prosecution of his claims.

If any of the foregoing Special Findings of Fact are more properly characterized as Conclusions of Law, they are hereby deemed such.

CONCLUSIONS OF LAW

1. The requirement of Trial Rule 23.1 of the Indiana Rules of Trial Procedure that a derivative plaintiff show what efforts were made to obtain the relief requested prior to the bringing of a derivative action, was met in the instant case by Grow's repeated legitimate demands upon Lasiter to turn over the books and records of GDC for inspection by the other officers, directors and shareholder, and her persistent refusal to do so.

2. Grow, as a shareholder and Plaintiff in this case, has fairly and adequately represented the interests of all other innocent shareholders similarly situated in the enforcement of the rights

of GDC against Defendants Lasiter and Ray Linton.

3. Defendant Ray Linton waived his right to assert any ownership interest in GDC when he failed to respond in any way to the letter of August 5, 1978 which called for payment of his subscription or such shares would for forfeited to GDC, and thereafter assisted in the preparation of income tax returns and schedules which did not reflect his interest.

4. Defendant Ray Linton's rights to assert ownership interest in GDC or a seat on its Board of Directors, are barred by the equitable doctrines of estoppels and laches because of his inexcusable delay in asserting such rights after August of 1978 and knowing acquiescence in the actions of the other shareholders and directors in assuming disproportionate shares of

personal liability for corporate indebtedness based upon their belief that they were the only shareholder or directors, and his assistance in the preparation of corporate tax returns and schedules which did not reflect his interest to the obvious detriment of and prejudice to Eugene Duran and Grow.

5. Defendant Lasiter is estopped to deny the equal ownership interests of Eugene Duran and Grow because of her representations to Eugene Duran and Grow that they each held thirty-three (33) shares as contained in returns and schedules prepared by her or at her direction and signed by her as Secretary of GDC, and their reliance upon each representation to their detriment.

6. The fact that no stock certificates were ever issued by GDC to

Eugene Duran or Grow for their respective shares is of no consequence, as the manifest intention of Grow, Lasiter and Eugene Duran that they were to be treated and considered by each other as "equal partners" was such that the law will give effect to these intentions and impose upon each of them to duty to deal openly, honestly and fairly with each other in their dealings as "incorporated partners" in GDC.

7. Defendant Lasiter is estopped to deny that Eugene Duran, Marilyn Duran or Grow failed to pay for their shares and has waived any such right to object because of her acceptance of their services for GDC, their assumption of liabilities of GDC on equal terms as her own, and her failure to object to the representations knowingly made to lenders,

the IRS and other third-parties that they were equal owners of GDC, at times when she should have objected, and the reliance of Eugene Duran and Grow upon these representations.

8. Grow as a derivative plaintiff, is entitled to recover on behalf of GDC, himself, and the other innocent shareholders similarly situated from the Defendants, Lasiter and Ray Linton, for the losses suffered as a direct and proximate cause of their negligence in failing to maintain accurate and sufficient financial records of GDC so as to permit the preparation of financial statements required by GDC's lenders.

9. Grow, as derivative plaintiff is entitled to recover, on behalf of GDC, himself and the other innocent shareholders similarly situated, from the

Defendants, Lasiter and Ray Linton, for the losses suffered as a direct and proximate cause of their negligence in refusing to turn over the books and records of GDC for inspection by the corporations officers, directors and shareholders despite legitimate demands that they do so.

10. Grow, as derivative plaintiff is entitled to recover, on behalf of GDC, himself and the other innocent shareholders similarly situated, from the Defendant Lasiter, for the losses suffered as a direct and proximate cause of her negligence in failing to make loan payments on GDC obligations to its primary lender, failing to pay crucial expenses including fees for engineering and marketing services, employee withholding taxes and builder's risk insurance

premiums, while at the same time paying herself a salary and bonuses; her brother an excessive salary and bonuses and a substantial portion of the expenses of running her accounting practice with GDC funds without the consent, authorization or knowledge of GDC, its officers, directors or shareholders.

11. Grow, as derivative plaintiff is entitled to recover
from GDC, the attorney's fees, costs and expenses reasonably incurred in asserting and prosecuting the rights of GDC against the Defendants, Lasiter and Ray Linton.

12. Grow, individually, is entitled to recover from Defendants, Lasiter and Ray Linton, as award of his attorneys fees, costs and expenses incurred in defending any claim of said Defendants

which was brought or maintained that was unreasonable under I.C. 34-1-32-1.

13. The Court, in fashioning the equitable relief to which Grow is entitled, as derivative plaintiff, on behalf of GDC, and the other shareholders similarly situated, may impress a trust upon the ownership interest claimed by Defendant Lasiter and enter a judgment that such interest be an thereby is conveyed to the corporation, so as to prevent the shareholder charged with wrongdoing from further participation in corporate affairs, or benefiting in any way from the relief granted to the Plaintiff on behalf of the corporation.

If any of the foregoing Conclusions of Law are more properly characterized as Findings of fact, they are hereby deemed to be such;

And the Plaintiff, Carl W. Grow, by Counsel, having orally moved the Court to conform the pleadings to the evidence presented at the trial of this matter, in accordance with Trial Rule 15(B) of the Indiana Rules of Trial Procedure, and the Court having granted same, it is hereby

ORDERED, ADJUDGED AND DECREED, that Plaintiff, Carl W. Grow, on behalf of the nominal Defendant, Greenwood Development Corporation, have and recover judgment against Defendant, Betty A. Lasiter f/k/a Betty A. Linton, for the unauthorized payments she made to herself, her accounting firm then know as Linton & Company, her brother Irvin Fisher, and the penalties imposed by the Internal Revenue Service for her failure to pay employee withholding taxes of Greenwood Development Corporation in the total sum of

$41,553.15, with interest thereon at the legal rate and the costs of this action; and it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiff, Carl W. Grow, on behalf of the nominal Defendant, Greenwood Development Corporation, have an recover judgment against Defendants, Betty A. Lasiter f/k/a Betty A. Linton, and Ray Linton, jointly and severally, for the losses of equity suffered by Greenwood Development Corporation in the conveyance of Areas 8 and 13 to Union Federal Savings and Loan Association in the sums of$60,083.87 and $88,961.66 respectively, and for the loss of profits on the Cielo Vista project in the sum of $678,807.00; for a total of $827,852.53 together with interest thereon at the legal rate and the costs of this action; and it is further

ORDERED, ADJUDGED AND DECREED that the ownership interest of Defendant Betty L. Lasiter f/k/a Betty A. Linton, in thirty-three (33) shares of stock in Greenwood Development Corporation is hereby impressed with a constructive trust in favor of said Corporation, with Carl W. Grow empowered to act as constructive trustee thereof, and such ownership interest is hereby transferred to Greenwood Development Corporation, so as to prevent said Defendant from participating in any further actions of said Corporation, and to prevent said Defendant from receiving any benefit by way of remuneration, indemnification or otherwise as a result of the judgments granted herein; and it is further

ORDERED, ADJUDGED AND DECREED that any right to assert an ownership interest

in Greenwood Development Corporation has long since been waived by Defendant Ray Linton; is barred by application of the equitable doctrine of estoppel and laches and, accordingly, no longer exists; and it is further

ORDERED, ADJUDGED AND DECREED that this Court's order of August 2, 1989, granting preliminary injunctive relief to Plaintiff and against those persons named therein is hereby made permanent and incorporated herein, with the bond previously posted by Plaintiff to be released and further, Defendants, Betty A. Lasiter f/k/a Betty A. Linton and Ray Linton, their officers, agents, servants, employees and attorneys and all persons action in concert and participation with them, be and hereby are permanently enjoined from acting as, for or on behalf

of Greenwood Development Corporation in any way whatsoever, including but not limited to the following;

The calling, holding or attending any meeting of the shareholders, officers and/or directors of Greenwood Development Corporation; The assertion of any right of Greenwood Development Corporation or as shareholders, officers and/or directors thereof; such injunctive relief to be afforded Plaintiff, Carl W. Grow, acting on behalf of Greenwood Development Corporation without bond; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to recover from Greenwood Development Corporation his reasonable attorneys fees and expenses, costs of deposition transcripts and fees for expert witnesses in the sum of

$68,570.00 which sum is a reasonable sum in light of the history of this case, the length of the trial in this matter and the complexity of the issues presented therein; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff, Carl W. Grow individually, is entitled to an award of and from the Defendants, Betty A. Lasiter f/k/a Betty A. Linton and Ray Linton, of his attorney's fees to be taxes as costs herein pursuant to I.C. 34-1-32-1, in the sum of $67,730.00 on the grounds that the defenses raised by said Defendants before and, more importantly, during the trial of this case, were so unreasonable as to cause an unwarranted delay of the trial of this case to the detriment and unwarranted expense of the Plaintiff, and as sanctions for the wilfull refusal of Defendants to

comply with prior orders of this Court for the production of books and records of Greenwood Development Corporation, which records were not even acknowledge to be in the possession of the Defendants until after the trial of this case commenced; and it is further

ORDERED, ADJUDGED AND DECREED that Betty A. Lasiter f/k/a Betty A. Linton and Ray Linton, recover nothing by way of cross-claim or counter-claim against either Defendant Greenwood Development Corporation or Carl W. Grow.

DATED: January 19,1990
Signed Gerald S. Zore

Marion County Superior Court
Room No. 7

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1. Court of Appeals of Indiana, Second District, Linton, Ray et al -V- Greenwood Dev. Corp. & Grow, Carl W.
Cause No. 49A02-9004-CV-00245, Lower Cause S786-0675
Appellants petition to reconsider trial courts denial of petition to stay enforcement of judgment pending appeal denied. 06/08/90.

2. Court of Appeals of Indiana, Second District Linton, Ray et al -V- Greenwood Dev. Corp. & Grow, Carl W.
Cause No. 49A02-9004-CV-00245, Lower Cause S786-0675
Issued the inclosed opinion: See Memorandum Decision. 06/09/92.

3. Court of Appeals of Indiana, Second District Linton, Ray et al -V- Greenwood Dev. Corp. & Grow, Carl W.

Cause No. 49A02-9004-CV-00245, Lower Cause S786-0675

Appellants petition for rehearing denied. 08/03/92.

4. Supreme Court of Indiana

Linton, Ray et al -V- Greenwood Dev. Corp. & Grow, Carl W.

Cause No. 49A02-9004-CV-00245, Lower Cause S786-0675

Appellant's petition to transfer denied. Randall T. Shepard, Chief Justice. All Justices concur. 10/26/92.

IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

APPEAL FROM THE MARION COUNTY
SUPERIOR COURT
ROOM NO. 7
The Honorable Gerald S. Zore, Judge
Cause No. S786-0675.

Betty A. Linton a/k/a
Betty A. Lasiter, and
Ray Linton
Appellants

v.

Carl W. Grow and Greenwood
Development Corporation
Appellees

DATE OF ENTRY: JUNE 9, 1992

SHIELDS, J.

MEMORANDUM DECISION

In January of 1981, Carl Grow (Grow) initiated this shareholder derivative action on behalf of Greenwood Development Corporation (GDC) against Betty Linton

(presently known as Betty Lasiter, referred to hereafter as Betty), seeking monetary and equitable relief in conjunction with Betty's operation of GDC. Ray Linton (Ray) was allowed to intervene in March of 1986 and filed a counterclaim against Grow in May of that year. Grow responded with counter-counterclaims against Ray, and the matter proceeded to bench trial in January of 1989.

On August 2,1989, the trial court entered Special Findings of Fact, Conclusions of Law, and an Order for Injunctive Relief in favor of Grow and GDC and against the Lintons. On January 19, 1990, the trial court entered Special Findings of Fact, Conclusions of Law, and Judgment in favor of Grow and

GDC and against the Lintons in the sum of $827,852.53 plus attorney fees.

The Lintons appeal.

The Lintons' first argument is that the trial court's judgment is erroneous because Grow lacked legal standing to maintain his derivative shareholder claims against the Lintons. The first prong of their argument is that Grow did not have standing because he intentionally failed to register his GDC shares. None of the trial court's findings of fact that relate to Grow's status as a stockholder with the consent of his fellow shareholders have been challenged by the Lintons[1]. Therefore, this prong of the Lintons' first argument is without merit because the "the fact that no certificate of stock was issued is of itself of no consequence . . .

provided the rights, privileges, and emoluments of a stockholder had been enjoyed with the consent of the corporation." Butler University v.

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[1]Some of these findings of fact recount representations made by GDC, some prepared by Betty, that Grow was a shareholder whose interest equalled her own. See Finding of Fact 28-38.

Scoonover (1888), 114 Ind. 381, 383, 16 N.E. 642, 643.

The second prong of the Lintons' first argument is their assertion that, as an attorney regulated by Ind. Pofessional Conduct Rule 1.8, Grow could not increase his ownership holding in GDC unless the remaining shareholders consented in writing. This argument is unavailing. Grow's ownership of the initial share he acquired at the time of incorporation is

undisputed; therefore, he is a shareholder whether he owns only one share or many.[2]

[2]Prof. Cond. R. 1.8 was not in effect until January 1,1987, more than six years after this action comenced. The rule then in effect, DR 5-104, prohibited an attorney from entering into a business transaction with a client "if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consent3d aftar full disclosure. Code of Professional Responsibility, DR 5-104. Under DRS-104 written consent was not required.

The third prong of this argument is that Grow "upon acceptance of 100% of the sole remaining asset of GDC as a liquidation distribution did not maintin shareholder standing throughout the litigation." Appellant's Brief at 37. Grow's treatment of the asset as a liquidation distribution is inconsequential; there is a distinction between liquidation and dissolution. The fact a corporation's assets are

liquidated does not mean the corporation is legally dissolved, i.e., ceases to exist. The critical event in terminating a corporation and the existence of stockholders is the act of legal dissolution. See IC 23-1-45-1 et seq. (1988). Further, Grow's representation the asset is a liquidation distribution does not constitute an admission that the corporation and his status as a shareholder has ceased to exist. Treas.Reg. I.332-2(c) provides that legal dissolution of a corporation is not required for a liquidation for tax purposes to occur. Further, Lintons' reliance upon Portnoy v. Kawecki (1979), 7th Cir., 607 F.2d 765F,767 and United States Fidelity & Guaranty v.Griffin (1989), Ind. App., 541 N.E.2d 553, 554-55, is unavailing. These cases

invclve the situation where a shareholder's interest in a merged corporation terminates, as does the shareholder's standing to maintain a derivative action, because the merger eliminates the shareholder's ownership in the stock of the merged corporation. That situation does not exist here.

The Lintons' second argument is that Grow either waived or is estopped from pursuing the subject action because he had control over GDC and its assets during the time GDC pursued its claims against Union Federal and because Grow breached his duty of loyalty to GDC for his personal gain. Their third argument is that Grow is precluded from litigating this action by the doctrine of claim preclusion. These arguments fail because the Lintons' failed to put these defenses

in issue in their responsive pleading as required by Ind. Trial Rule 8(c).

The Lintons' fourth argument is the trial court erred because its judgment imposing a constructive trust on the shares owned by Betty is not supported by findings of fact that she acquired her shares unlawfully or by fraud. Citing 76 Am.jur.2d Trust, Section 22, the Lintons assert constructive trusts are appropriate only in conditions of wrongful acquisition or retention of property predicated on fraud. The trial court imposed the trust to prevent Betty from participating in corporate affairs or benefiting from the relief granted to the corporation. This is a legitimate use of the trial court's equitable powers. See Dotlich v. Dotlich(1985), Ind. App.,475 N.E. 2d 331, 340.

The Lintons' fifth argument is the trial court erred in awarding attorney fees payable from them personally to Grow personally. They claim the award is not supported by obdurate conduct, and further, the award to Grow personally is inappropriate. We agree. Grow's claim for fees is from the corporation and, in fact, the trial court's judgment gave him such an award of $68,570, which the Lintons do not contest.

The Lintons' final argument is that the trial court erred in failing to address Ray's legal malpractice claim in any of the court's findings of fact. This final argument is without merit. Ray's theory is that Grow committed malpractice because he failed to issue to Ray seventeen shares of stock in GDC for

which Ray paid. The trial court addressed this claim when it determined Ray was one of the original shareholders of GDC and held seventeen shares and that thereafter, Ray waived his right to assert an ownership interest in GDC and determined that Ray is barred by the doctrines of estoppel and laches from asserting any ownership interest. See Record at 259 (Finding of Fact 7); Record at 261 (Findings of Fact 20-24); Record at 263 (Findings of Fact 40 and 42); Record at 283-84 (Conclusions of Law 4 and 5).

Cause remanded to the trial court with instructions to vacate the award of attorney fees from the Lintons to Grow, individually, after which the judgment is affirmed.

MILLER, J., CONCURS.

SULLIVAN, J., CONCURS IN RESULT.

AFFIDAVIT OF JACQUELINE AUSTIN

JACQUELINE AUSTIN, being first duly sworn upon her oath, deposes and says that:

1. I am over the age of 18 years, a citizen of the United States, and not under any mental or legal disability and have personal knowledge of the facts set forth herein.

2. I am the official Court Reporter for the Marion County Superior Court Room 7.

3. While preparing the transcript of this matter requested by counsel for Carl W. Grow and Greenwood Development Corporation to supplement the record on appeal, I discovered that one entire audio tape containing part of Plaintiff's Case in Chief could not be transcribed.

4. I sent the tape to an outside company to have the audio enhanced. They returned the tape to me with the explanation that the volume of the tape could not be improved due to the fact that, in their opinion, the tape had been erased.

5. The machine I use for transcription does not have an "erace" function.

FURTHER AFFIANT SAYETH NOT.

Jacqueline Austin

I AFFIRM UNDER THE PENALTIES FOR PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

Jacqueline Austin